

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2004G046

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

ROBERT GALLARDO,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS, DIVISION OF ADULT PAROLE AND COMMUNITY
CORRECTIONS,

Respondent.

Administrative Law Judge Mary S. McClatchey held the hearing in this matter on October 20, 2004, at the State Personnel Board, 1120 Lincoln Street, Suite 1420, Denver, Colorado. Complainant appeared through counsel, Charles D. Esquibel, Esquire. Respondent appeared through counsel, Assistant Attorney General Valerie Arnold.

PROCEDURAL BACKGROUND/MATTER APPEALED

Complainant, Robert Gallardo, a certified Correctional Officer ("CO") III for the Department of Corrections ("DOC"), filed a petition for hearing with the Board challenging the agency's denial of his grievance. The matter was set for Preliminary Review. On June 10, 2004, the Administrative Law Judge entered a Preliminary Recommendation ("PR") to deny a discretionary hearing. On August 2, 2004, the Board reviewed the PR and entered an order granting a hearing on two issues: "1. the parties' compliance with the grievance process; and 2. Complainant's claim of hostile work environment." The case was set for hearing.

For the reasons set forth below, the Respondent's action is **affirmed**.

ISSUES

1. Whether Respondent's denial of Complainant's grievance was arbitrary, capricious, or contrary to rule or law;
2. Whether Complainant is entitled to an award of attorney fees and costs.

FINDINGS OF FACT

1. At all times relevant, Complainant was a Supervising Lieutenant in the Adult Unit at the Youth Offender Services ("YOS") prison facility in Pueblo, Colorado.
2. In the spring of 2002, Complainant became concerned about the manner in which prison managers handled a group of inmates that had violated prison regulations. Complainant believed the managers had improperly allowed prisoners to escape punishment for their misbehavior, and had thereby undercut his and his subordinate correctional officers' authority in the prison.
3. Complainant voiced his concerns up the chain of command.
4. On June 25, 2002, he was called into a meeting with a DOC Investigator, Mark Finley. The interview first focused on recent inmate incidents involving contraband and use of force. Then, Complainant felt that the interview "turned on him," as Finley began to ask him questions regarding the nature of his relationship with Officer Roybal, a female officer under his supervision. Roybal was not a management favorite, and was suspected of having provided the inmates with contraband. Complainant had, in a recent meeting, expressed his support for her as a professional, which he felt had put him at political risk. Complainant was offended by Finley's questions regarding Roybal, as he felt he was being accused of having an affair with her. Finley also asked Complainant about statements he had made at a meeting one month prior concerning morale issues. Complainant had never been informed that he was the subject of an investigation, and believed the entire line of questioning was improper.
5. At the end of the meeting, Finley stated to Complainant, "this meeting never happened."
6. Complainant was extremely troubled by the tone and content of the meeting with Finley.

Complainant's Grievance

7. On July 23, 2002, Complainant drafted a seven-page grievance statement and submitted it to DOC Inspector General Michael L. Rulo. He copied YOS Warden Brian Gomez and Jeaneene E. Miller, Division of Adult Parole and Community Corrections Director. The grievance contains the following assertions:
 - Recent inmate incidents have been documented, but not properly addressed, which has caused Complainant to have serious concerns as a unit supervisor about staff and inmate safety;
 - Allowing inmates to avoid personal disciplinary action and to return to the general population has caused a hostile work environment for staff by shifting control from staff to inmates. Specifically, allowing four inmates, three of whom are recognized as white supremacists comprising a Security Threat Group ("STG"), to return to the general population has sent the message to the adult inmate population that if inmates

make allegations of unprofessional misconduct by the staff, the inmates will not receive disciplinary action for their own behavior;

- "Allowing these three identified white supremacist inmates back into the adult unit population from segregation with no accountability and or responsibility for there [sic] assaultive behavior and gang activity has caused a hostile and threatening working environment for the staff and inmates. The message sent to the staff and inmates is that the white supremacists have control of the adult unit and not the staff."
 - After returning from annual leave, Complainant had inquired as to why the Code of Penal Discipline ("COPD") charges had been dropped on all of the inmates involved in the assault incident, and was informed that the inmates had been permitted to make "pay offs" against a staff member to avoid prosecution. This type of investigation has caused a hostile work environment for staff;
 - Investigation of a staff member, based on inmates' allegations, has caused a hostile work environment for staff, threatens inmates' safety and security, and is totally against departmental policy and DOC's mission;
 - The investigation was one-sided as it was based on the inmates' allegations against a staff member. Other documented events and concerns must also be investigated;
 - Complainant requested a Professional Standards Investigation, pursuant to Administrative Regulation (AR) 1150-04(I);
 - At the June 25, 2002 meeting with investigator Finley, he had questioned Complainant, in a hostile and intimidating manner, about his professional relationship with Officer Roybal, whom inmates alleged had brought in tobacco. He also stated that Finley had harassed and intimidated Complainant about having poor supervisory judgment in supporting Officer Roybal, although Finley had not been present at the meeting where he had made his statement about Roybal's work performance;
 - "I do [foresee] retaliation and or continued harassment from Mr. Finley and Y.O.S. administrative staff and/or staff person for writing this report and stating such allegations, please investigate. I do not wish to be transferred from this facility because I feel that I, as a supervisor have not done anything wrong in my ability to supervise staff fairly and without biases. As a supervisor interacting with staff on a daily professional level, I feel that I should acknowledge staff contributions to the facility mission."
8. On July 23, 2002, Complainant attended a meeting with Warden Gomez for the purpose of discussing the above matters. In the course of that meeting, when Complainant informed Gomez that he had filed a written grievance with the Inspector General's office concerning the issues, Gomez became extremely angry, and snapped at Complainant, "That was pretty shitty of you." Gomez was irritated that Complainant had not given him

the grievance prior to sending it up the chain of command. He told Complainant he “could leave now,” as he had his grievance.

9. After the meeting with Gomez, Complainant immediately wrote a supplement to his original written grievance and filed it with Inspector General Rulo and Miller. He described the meeting with Gomez, Gomez’ hostile attitude and inappropriate statements regarding his having filed the grievance, and reviewed the administrative regulations regarding the filing of grievances that relate factually to supervisors. He stated in part, “When I arranged this meeting with Mr. Gomez, I felt that the director would be a neutral and non-bias[ed] party of this grievance. After being verbally abused by Director Brian Gomez of Y.O. S., it has become my conclusion that this has become a personal matter with Y.O.S. administration.
10. Complainant requested a temporary transfer to another Pueblo facility as relief, “to avoid any further verbal abuse, harassment, and or intimidation by the Y.O.S. administrative staff during this grievance process, thank you.” He closed by stating, “this grievance is not to offend anyone such as I was, only to address facility concerns of safety and security, thank you.”
11. On July 30, 2002, Complainant filed the DOC official Step I grievance form with Brian Gomez. All parties have treated this as Complainant’s Step II grievance. He requested the following relief:
 - In the interest of the safety and security of staff and inmates, inmates be held responsible and accountable for their behavior in accordance with the COPD;
 - In the interest of the safety and security of staff and inmates, inmates be held responsible in accordance with the Security Threat Group Identification and Management regulation;
 - Uphold the Staff Code of Conduct;
 - A Professional Standard Investigation be held concerning the covering up and allowing inmates to avoid COPD sanctions in exchange for agreeing to allegations of staff misconduct which were not proven and/or not investigated fully; and
 - Cessation of the hostile, intimidating, unprofessional harassment by the Y.O.S. administrative staff and Y.O.S. investigator of Complainant’s supervisory skills and his professional staff relationships.

Waiver of Grievance Timeframes

12. On July 31, 2002, Miller sent a memorandum to Complainant indicating receipt of the grievance and that she would be unable to respond to it until the IG office had completed

its review. She sent another letter to him stating nearly the same thing on August 22, 2002.

13. On August 1, 2002, Warden Gomez sent a memorandum to Complainant indicating that since his initial complaint had been referred to the IG's office, "the time frames have been waived."

Transfer of Complainant to Territorial

14. During the pendency of his grievance, in November 2002, Gomez approached Complainant and informed him verbally that his position would be transferred to Territorial Correctional Facility, in Canyon City, in two days. Complainant was not involved in the decision making process for this action; he had been out of the loop.
15. Complainant viewed his transfer as retaliation for having filed the grievance. This is not the case, for the reasons set forth below.

Creation of Y.O.S. Adult Unit in 2001; Closure of the Unit in 2002

16. The Y.O.S. prison facility in Pueblo is a youth detention facility, capable of housing up to 480 incarcerated individuals. Prior to July 2001, it contained only 200 incarcerated youth. To address overcrowding in other prisons at that time, and to more efficiently utilize available space, in July 2001 DOC created the Adult Unit at Y.O.S. DOC closed the Pre-Release unit at Canyon Minimum Centers facility and transferred 120 adult offenders to YOS, as well as 32 correctional officers, to manage the adult population.
17. Complainant was one of the officers brought to YOS from Pre-release at that time, and became one of four Lieutenants in charge of the correctional team in the Adult Unit. He and others moved their families to Pueblo at the time of transfer. Complainant testified he was "totally involved" in this process of transferring Pre-release personnel to YOS
18. In March 2002, Miller was given appointing authority over YOS as its new Director. She conducted an assessment of the effect of the Adult Unit on the institutional goals of the youth offender program there. She determined with certainty that the presence of the Adult Unit was detrimental to the mission of YOS. (While the Adult Unit was "separate" from the youth programs, the programs overlapped in several negative ways. For instance, the adults introduced contraband to the youth in the kitchen).
19. In November 2002, Director Miller closed the Adult Unit at YOS, transferring all of the adult population and related correctional staff to other facilities, including Territorial.
20. Miller had professional motives in closing the Adult Unit. However, unfortunately, Respondent failed to communicate appropriately with its affected employees regarding the closure, including Complainant.

21. Rumors were the primary, and possibly the only, source of information in early October 2002. The flurry of rumors prompted the entire Adult Unit staff, including Complainant, to write a letter directly to Joe Ortiz, Executive Director of DOC, on October 8, 2002. The letter states in part, "Last Friday we found out that our Unit was going to be closed down by the first of the year." The letter outlines their history with the unit, sacrifices made to move to Pueblo to work there, and closes by stating, "We just wanted you to think about us as people, not numbers when you are deciding our future. We would like to be considered for vacancies in Pueblo, first, rather than assignments elsewhere . . . Thank you for your time and consideration."
22. Neither Ortiz nor any other DOC official responded to this letter. On November 4, 2002, Gomez emailed his Adult Unit staff, including Complainant, regarding his intention of meeting with each staff member to discuss the impending move. However, despite the fact he was one of four supervising lieutenants in the Adult Unit, Complainant remained in the dark throughout the closure process. Complainant had no idea until the day of hearing why Miller closed the Adult Unit, and was unaware of the scope of the closure.
23. DOC's failure to adequately communicate with Complainant and other staff at DOC regarding its closure of the Adult Unit fueled his perception that DOC retaliated against him for filing his grievance. The entire process was clearly traumatizing to him.¹
24. Neither Miller nor any other DOC official transferred Complainant to Territorial in retaliation for having filed the grievance. However, Gomez and other managers did not treat Complainant with the professional respect he was due in the process.

Miller Investigation; Action on the Grievance

25. In November 2002, the IG Office completed its investigation into Complainant's grievance and forwarded its investigative report to Director Miller. That report is not in evidence.
26. Miller then interviewed Inspector General Rulo, Investigator Finley and other IG investigators, and several YOS managers.
27. Miller reviewed all of Complainant's written grievance materials submitted, reviewed the IG's investigative report; interviewed all involved parties; and considered the five areas of relief requested by Complainant.
28. Miller viewed several of Complainant's grievance issues to be valid.

¹ Complainant's transfer to Canyon City had a dramatic effect on his personal life and finances. He resides in Pueblo with his wife and children. He began to commute to and from work, a forty-mile trip, and his family incurred \$280.00 in additional childcare expenses each month.

29. On January 23, 2003, Miller met with Complainant to discuss his grievance. At that time, he had already moved to Territorial. He and Miller discussed all of the issues he had raised in his grievance.
30. Complainant had requested in his grievance not to be transferred in retaliation for having filed the grievance. At the January 23, 2003 meeting with Miller, he raised the issue of his transfer potentially having been in retaliation for his grievance. Her response is not in the record. She did suggest that he file the necessary paperwork requesting a transfer back to Pueblo. He has done so repeatedly, but as of the date of hearing had not been granted a transfer.
31. By letter dated February 10, 2003, Director Miller issued her grievance response to Complainant. She inadvertently sent it to his old address, and he did not receive it until several months later (see below). Miller's final grievance response stated the following:
- Miller reiterated their agreement to waive time frames for processing of grievances;
 - Regarding the inmates that managers allegedly failed to hold accountable for con-compliant and assaultive behavior on June 18, 2002, Miller determined that they had served twelve days in segregation, after which the Penal Code charges had been dropped. She concluded that this disposition was within the provisions of the penal code and within the scope of the appointing authority's responsibilities. She determined the decision to dismiss the cases was intended to gain management control over the facility;
 - Miller reiterated that safety and security of staff and offenders is DOC's first priority. She indicated she had instructed Warden Gomez to manage the YOS facility in compliance with all DOC administrative regulations;
 - Regarding the Finley interrogation, she stated that the IG investigation conducted by Investigator Finley is under the direction of Inspector General Mike Rulo. She determined that Finley had done nothing wrong, and had asked him a routine question regarding Officer Roybal. Miller stated she understood Complainant's sensitivity regarding the question, and apologized "if it caused you any embarrassment."
 - Miller reported, "The Inspector General's Office conducted a complete Professional Standards Investigation regarding the incidents listed. There were indications of workplace harassment or willful failure to comply with policies and procedures." She failed to indicate what, if any, actions were taken to address these findings.
 - Miller further stated, "The last issue pertained to the August 10, 2002 Fact Finding Investigation. I cannot provide a copy because information regarding other staff members was included in the report. The report focused on the need for training, communication, intelligence and camera installation. I have attached a copy of the action steps. Pertaining to your part of the report the committee reported that you were sincere and felt there were legitimate safety/security concerns." [The "action

steps” referred to were not introduced into evidence by either party. Therefore, no findings can be made regarding what actions Respondent took.]

- Regarding Gomez’s statements at the July 23, 2002 meeting with Complainant concerning his grievance, Miller stated that she had spoken to Gomez about it, that he “was very apologetic and recognized his comments were inappropriate. Mr. Gomez offered to send you a written apology. (see attached)” Gomez did send an apology letter to Complainant.
 - Miller closed by stating, “I have addressed your issues and relief requested and consider this matter closed. Again, Mr. Gallardo, thank you for your cooperation and professional manner in presenting your concerns. Your information was valuable input for making changes and improving communication and training.”
32. Complainant contends that Miller failed to address issue number #5 in his July 30, 2002 written grievance: “That the hostile, intimidating, unprofessional harassment of my supervisory skills and my professional staff relationships [cease] by the YOS administrative staff and YOS investigator.”
33. Miller did address this issue in part. She investigated the context in which Finley asked his interview questions, spoke with Inspector General Rule, and discussed Finley’s statements in her letter. In addition, she spoke to Gomez about his inappropriate statement and attached his apology letter to her grievance decision. This apology letter was appropriate. In view of the fact Complainant had transferred to another facility prior to the time she issued her grievance decision, there appears to have been nothing else for her to address in regards to the issue of harassment by YOS managers.
34. One of Complainant’s central contentions with respect to issue #5 is that his transfer itself was harassing and retaliatory. That claim has been addressed above and is unfounded. While communication about the transfer was handled extremely poorly by DOC, there is no evidence it was initiated to harass or retaliate against Complainant.
35. Complainant also contended at hearing that he has been retaliated against by DOC because he has not been transferred back to a Pueblo facility. He has applied for several transfers. There is insufficient evidence in the record on this issue to render findings of fact. No specific information is in the record concerning positions for which he was eligible and rejected.

Compliance with Grievance Procedure

36. Complainant moved his residence from Carlyle Place to Stoneacre Court in the year 2001. He registered this change of address with the appropriate personnel office at DOC, and it was effective on DOC’s computer system as of September 18, 2002.
37. Complainant used his current, Stoneacre address on his grievance forms. Due to clerical oversight and neglect, Respondent continually sent Complainant correspondence to the

wrong address; at times, it printed the old address on envelopes, but then wrote in the correct new address before correspondence was sent out.

38. Neither Miller nor the administrative personnel in her office responsible for sending the February 11, 2003 final grievance decision letter was aware of his change of address. Therefore, it was inadvertently sent to the wrong address.
39. On July 11, 2003, Complainant sent a letter to an IG criminal investigator for DOC, inquiring about the status of his grievance. In his letter, he notes that while both parties to the grievance had waived time frames, much time had passed.
40. On July 22, 2003, the IG's Office sent a letter to Complainant indicating it had completed its investigation and had forwarded his July 11, 2003 letter to Director Miller.
41. The address mix-up continued. Ultimately, Complainant received Miller's February 10, 2003 letter on November 18, 2003.
42. Respondent erred in failing to use the address Complainant listed on his grievance form and with the personnel office. This error was inadvertent, not intentional. Unfortunately, and understandably, this error on DOC's part also fueled his perception that DOC was treating him in less than a professional manner.
43. Both parties complied with the grievance procedure.

DISCUSSION

In this appeal of an administrative decision that does not adversely affect Complainant's pay, status, or tenure, Complainant bears the burden of proof to demonstrate that Respondent's action on his grievance was arbitrary, capricious or contrary to rule or law. §24-50-123, C.R.S.; Board Rule R-8-48.

Arbitrary or capricious agency action may arise in one of three ways: 1) neglecting or refusing to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failing to give candid and honest consideration of evidence before it on which it is authorized to act in exercising its discretion; or 3) exercising its discretion in such a manner after consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Department of Higher Education*, 36 P.3d 1239, 1252 (Colo. 2001).

The Board granted a hearing on two issues; 1. the parties' compliance with the grievance process; and 2. Complainant's claim of hostile work environment. While DOC's actions as related above caused unnecessary hardship to Complainant, he has not met his burden of proof.

1. The parties complied with the grievance process.

The parties mutually agreed to suspend all deadlines associated with the grievance process. This fact is undisputed. Respondent inadvertently failed to send its final grievance decision to Complainant at his current address. He received it very late, on November 18, 2003. Complainant sent his petition for hearing with the Board on December 1, 2003, making the appeal of the grievance decision a timely filing. Board Rule R-8-8(3). The parties complied with the grievance process.

2. Complainant failed to prove Respondent created a hostile work environment.

At hearing, Complainant did not present argument or introduce evidence concerning his contention, in his grievances, that management had created a hostile work environment for prison staff by failing to hold inmates accountable for violating the prison's Penal Code. Therefore, he waived this issue at hearing.

Complainant's central claim of retaliation and harassment consists of the following assertion in his Trial Brief: "nowhere in [Miller's] response does she address the adverse actions (i.e.) reassignment/displacement of Mr. Gallardo from Y.O.S." As relief, he requests reassignment to a Pueblo facility.

Complainant's claim fails. Miller's testimony concerning the reasons for closing the Adult Unit was un rebutted by Complainant. There is no reason to question it. Miller assessed the effect of housing adults at a youth detention facility, and found it to be detrimental to the youth population. She closed the Adult Unit to solve the problem. Gallardo and several other officers' positions were moved to other facilities, along with the adult inmate population. Respondent's reasons for moving Complainant's position were unrelated to his grievance.

Complainant presented himself at hearing, and throughout the grievance process, as a true professional with the highest of standards. He has no ax to grind; he sought to highlight a problem, and Miller verified that the problem existed and took steps to address it. For reasons that are unclear, DOC failed, repeatedly, to communicate appropriately with Complainant both verbally and in writing. This pattern of conduct led Complainant to feel he was not being treated with the professional respect he was due. In the future, Respondent may well avoid grievances and litigation if it takes care to more appropriately communicate its personnel decisions to its employees.

Lastly, Complainant seeks an award of attorney fees and costs. Such an award is mandated where the Board finds that the personnel action was instituted "frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless." Section 24-50-125.5, C.R.S. Complainant has failed to meet his burden. He is not entitled to an award of attorney fees or costs.

CONCLUSIONS OF LAW

1. Respondent's action was not arbitrary, capricious, or contrary to rule or law.

2. Complainant is not entitled to an award of attorney fees and costs.

ORDER

Respondent's action is **affirmed**. Complainant's appeal is **dismissed with prejudice**.

Dated this 3rd day
of December, 2004, at
Denver, Colorado.

Mary S. McClatchey
Administrative Law Judge
1120 Lincoln Street, Suite 1420
Denver, CO 80203
(303) 764-1472

CERTIFICATE OF MAILING

This is to certify that on the ____ day of December, 2004, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE; NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Charles D. Esquibel
222 S. Union Avenue
Pueblo, CO 81003

and in the interagency mail to:

Valerie Arnold
Assistant Attorney General
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Andrea C. Woods